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Supreme Court, U.S.
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No. 03-1131

IN THE

Supreme Court of the United States

CINEMARK USA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. INTRODUCTION

For the last six years, the Department of Justice has pursued a strategic and calculated course of litigation and nonacquiescence in order to impose a new design standard under the Americans with Disabilities Act, uninhibited by the notice required by Congress and without incurring the inconvenience of notice and comment rulemaking under the Administrative Procedure Act. While it is hardly surprising that the Solicitor General seeks to avoid exposing the DOJ's *de facto* legislative rulemaking to the scrutiny of this Court, it is incongruous that, after resisting notice and comment rulemaking for years in favor of its aggressive litigation campaign, the Government now conjures up rulemaking in an attempt to avoid this Court's review of the judicial conflict its strategy has created.

Petitioner Cinemark USA, Inc. demonstrates clear circuit conflicts on urgent and compelling questions of law under the ADA and the APA. In enacting Title III of the ADA, Congress mandated notice and clarity so that the builders of our nation would not have to guess about their construction obligations. Congress also incorporated specific procedures under the APA for the imposition of Title III construction obligations. The Department of Justice's decision to add construction obligations by litigation, rather than rulemaking, jeopardizes this congressional mandate. More broadly, the DOJ's actions raise an important administrative law question – to what extent should courts defer to an agency's post hoc and substantive interpretation of its regulations, announced through litigation rather than rulemaking – that has vexed some of this nation's most astute appellate judges. The Sixth Circuit, in conflict with several other circuits, has adopted a posture of reflexive deference to precisely this type of agency action. This conflict speaks to the power of agencies to retroactively alter the existing regulatory landscape by informal means, and the judiciary's crucial role of ensuring that the exercise of purported agency power does not exceed the statutory boundaries established by Congress. Simply put, this case raises issues of broad and deep

significance, striking at the heart of the relationship between the branches of the federal government.

New regulations demonstrably are not on the way any time soon and their appearance would not alleviate the pending circuit conflicts or retrofitting issues facing the industry. The Government's efforts to marginalize the circuit conflicts and downplay the significance of the questions presented by Petitioner do not withstand scrutiny. The Government claims entitlement to deference, even though its pronouncement is not genuinely interpretive and clashes with the structure and purpose of the underlying Title III statute. The Government claims that the Sixth Circuit's application of controlling deference was proper, despite the agency's previous attempts to avoid APA review by arguing that its interpretation is not "final agency action" and has no "force of law." The Government asserts that the DOJ's interpretation of the regulation is compelled by its plain meaning, even though the DOJ itself has offered multiple and evolving interpretations of the key language over the past six years with which numerous courts have disagreed.

II. ARGUMENT

A. Review Is Warranted To Resolve Circuit Conflicts On Judicial Deference.

The Government's treatment of the administrative law question presented in Cinemark's Petition is superficial and avoids the circuit conflicts. The Government cites the pre-APA case of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), in which the Court gave substantial deference to an agency's interpretation of its own regulation. U.S. Br. at 15. The Government glosses over Cinemark's central point, however: *Seminole Rock* established only a qualified presumption of deference that can be overridden. As previously stated, whether deference to an agency's interpretation of its regulation is warranted turns on the context of the interpretation. Cinemark Petition at 18. *Seminole Rock* deference recedes when an agency's

interpretation of its regulation would frustrate the statutory scheme under which the regulations were promulgated. *See Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 271 (1994). The Sixth Circuit, like the Ninth Circuit in *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), failed to acknowledge this fundamental limit on *Seminole Rock* deference. Instead, both courts reflexively deferred to a nominal interpretation of ADA Standard 4.33.3 that subverts the purpose and structure of Title III of the ADA. By contrast, the Fifth Circuit declined to defer to what it characterized as the DOJ's "litigation position" on the meaning of Standard 4.33.3 and instead adopted a reading of the regulation that more closely comports with the intent of Title III. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788-89 (5th Cir. 2000). The Government elides this circuit conflict.[1]

The Government also discounts the severe tension between the DOJ's current interpretation of Standard 4.33.3 and Title III – a tension that makes *Seminole Rock* deference inappropriate. In particular, the Government ignores Congress's concern for certainty and predictability in the implementation of Title III, and its corresponding determination that parties contemplating new construction should have detailed and clear guidance on their Title III obligations. *See* Cinemark Petition at 20-21; AMC *Amicus* Br., Regal Petition No. 03-641, at 8-20. The Government denigrates at least part of the statutory mandate, implicitly denying the

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1. The Government asserts that the Fifth Circuit in *Lara* does not conflict with the Sixth and Ninth Circuits on the agency deference issue. U.S. Br. at 16 n.8. But while the Fifth Circuit did not discuss *Seminole Rock* by name, it tersely rejected the DOJ's "litigation position" as announced via *amicus* brief. *See Lara*, 207 F.3d at 788-89. For all practical purposes, the Government was a party in the *Lara* case, participating by hearing, briefing, and oral argument in the district court and by briefing and oral argument in the appellate court, with the case revolving around the DOJ's *amicus* interpretation of Standard 4.33.3, for which the DOJ unequivocally asserted entitlement to deference. *See* Brief of *Amicus Curiae* United States on Summary Judgment Issues at 2, *Lara v. Cinemark USA, Inc.*, <http://www.ada.gov/briefs/larabr.pdf>.

overwhelming evidence of the importance Congress placed on clarity and advance notice under Title III. *See* U.S. Br. at 18. The D.C. Circuit recognized as much in *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), which the Government also ignores. In an opinion authored by Judge Silberman, the D.C. Circuit observed that the DOJ's post hoc attempt to add new content to a technical assistance manual, through the vehicle of an *amicus* brief in private litigation, contravened Title III's mandate for clear prospective guidance. Under those circumstances, the D.C. Circuit expressed doubt on the applicability of *Seminole Rock* deference to a position advanced in an *amicus* brief. *Id.* at 589.

The Government also minimizes the statutory deadline for issuance of technical assistance manuals. U.S. Br. at 18. But this begs the question: what does Standard 4.33.3 itself say about seating for the disabled in these new facilities and what is it about Standard 4.33.3 that puts builders on notice that design requirements will be different in these new facilities? The 1998 district court *amicus* brief in *Lara* was not helpful guidance; it was aggressive advocacy designed to hold the industry liable retroactively in exactly the manner that Congress wished to avoid. Cinemark Petition at 8; AMC *Amicus* Br. at 8-20.[2] In affording *Seminole Rock* deference to those positions, the Sixth Circuit's holding here and the Ninth Circuit's holding in *Stewmon* squarely conflict with authority in other circuits. Cinemark Petition at 22-23 & n.17.

In overlooking the consequence of imposing retroactive liability based on an agency's informal, post hoc interpretation of its regulation, the Sixth Circuit relied on *Auer v. Robbins*, 519 U.S. 452 (1997). In *Auer*, this Court invited the Department of Labor's participation via *amicus* in a case in which the agency

2. The Government asserts that it has "consistently" interpreted the phrase "lines of sight comparable" in Standard 4.33.3. U.S. Br. at 19 n.10. Every cinema company in litigation with the DOJ has documented to the contrary. *See, e.g.*, Cinemark Petition at 6-9, 22-23 and n.16; *see also* NATO *Amicus* Br., Regal Petition No. 03-641, at 3, 4, & n.6, 13 ("constantly changing formulations" of Standard 4.33.3); Hoyts *Amicus* Br., Regal Petition No. 03-641, at 2-3, 7-16 (shifting interpretations of Standard 4.33.3).

was not a partisan. The Department was asked to formulate a policy at the highest level and was not defending a vested litigating position. Under those circumstances, this Court held that the DOL's position was entitled to *Seminole Rock* deference. *Id.* at 462-63. The circumstances of this case do not resemble *Auer*. However, the Sixth and Ninth Circuits were not dissuaded from hewing to *Auer* by *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) and *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001). While the Government asserts that *Christensen* and *Mead* do not "cast doubt on the propriety" of the deference afforded it under *Auer* (U.S. Br. at 15), the D.C. and Seventh Circuits are not so sure, and have questioned the vitality of *Auer* after *Christensen* and *Mead*. *See* Cinemark Petition at 16 (citing cases). Judge Posner went so far as to declare "[p]robably there is little left of *Auer*." *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003). Based on that assessment of *Auer*, Judge Posner applied *Christensen* and *Mead*, concluding that an agency's interpretation of regulations pronounced in litigation was not entitled to deference. *Id.* at 993-94; *see also Paralyzed Veterans*, 117 F.3d at 589 (Silberman, J.) (suggesting that *Seminole Rock* deference should not be afforded to the DOJ's interpretation of Standard 4.33.3 announced in litigation).

The Government seeks to reconcile *Auer* with *Christensen* and *Mead* by pointing out that *Auer* dealt with deference to an agency's interpretation of its regulations, while *Christensen* and *Mead* involved claimed deference to agency interpretations of statutes. U.S. Br. at 15. However, it is not clear why an agency should have more leeway to propound regulatory interpretations through actions short of formal rulemaking or adjudication than it does to propound statutory interpretations through such informal action. *See* Cinemark Petition at 19. And even if the distinction the Government draws supports a substantive difference in result (and Cinemark submits it does not), it has no bearing on whether Cinemark's Petition should be granted. The circuit conflict remains real and demonstrable. In the Sixth and Ninth Circuits, substantive regulatory policy made by

agencies through litigation briefs is given deference; in the Fifth, Seventh, and D.C. Circuits, it is not.[3]

Not only is the deference afforded by the Sixth and Ninth Circuits to the Government's litigating position questionable under *Christensen* and *Mead*, it is also facially inconsistent with the Government's repeated protestations that its interpretation does not have force of law or constitute "final agency action." The Government has defended APA claims and counterclaims brought by Cinemark and others by asserting that its interpretation does not constitute final agency action, was not the considered judgment of the agency, was not binding, and lacked force of law. *See* Cinemark *Amicus* Br., Regal Petition No. 03-641, at 7-9.[4] Yet, by calling for controlling deference to its interpretation from courts, and being afforded that deference without independent review of whether the Government's interpretation is truly interpretive or the "fair and considered judgment" of the agency, the Government transforms its "interpretation" into just what the agency said it was not – final agency action. *See* Cinemark *Amicus* Brief at 16-17 and n.17. This circuit split has enormous ramifications for

3. The Government's assertion (U.S. Br. at 15 n.6) that "Petitioner does not argue that the courts of appeals are in conflict on the legal standard governing deference to agency interpretations of their own regulations" is incorrect. Not only has Cinemark demonstrated the specific deference conflicts between the Fifth, Sixth, and Ninth Circuits regarding Standard 4.33.3, but also the general deference conflicts between the D.C. and Seventh Circuits, on the one hand, and the Sixth and the Ninth Circuits, on the other. *See* Cinemark Petition at 16-17, 19-21. The Government also argues that this case is an inappropriate vehicle for the resolution of any such conflicts because the Sixth and Ninth Circuits allegedly applied the "'plain meaning' of the regulatory text" U.S. Br. at 16. The Government ignores, however, the express invocation of *Auer* and extended deference discussions by both courts, and fails to adequately explain the different result in the Fifth Circuit. *See United States v. Cinemark*, 348 F.3d at 578-79; *Stewmon*, 339 F.3d at 1131-33.

4. The DOJ has repeatedly made this argument to defeat counterclaims and affirmative defenses alleging APA violations in parallel cases. *See United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1115-16 (C.D. Cal. 2002); *Cinemark USA, Inc. v. United States*, No. 99-CV-0183, 2000 WL 915091, at *7 (N.D. Tex. July 6, 2000).

implementation and enforcement of the ADA, one of the nation's most sweeping civil rights statutes, and for a regulated public generally.

B. Anticipated Revisions To ADAAG Will Not Resolve The Conflicts Or Uncertainty.

The DOJ's six-year litigation campaign against the motion picture theater industry has caused deep conflicts in the circuits and copycat private litigation that exacerbate the problems. The Government characterizes the conflict as "shallow" and implies that it will disappear with assertedly forthcoming Access Board rules, which "will then be followed" by new DOJ rulemaking. U.S. Br. at 8. The Government's "wait until tomorrow" solution is no solution at all. The notion that a definitive regulatory pronouncement is imminent is both incorrect and irrelevant. The Government conflates the ADAAG with the actual regulations at issue in this case, the DOJ's "ADA Standards for Accessible Design" or "JDSAD." While the Access Board's ADAAG and the DOJ's ADA Standards are sometimes used interchangeably, the distinction between the two is material here because only the ADAAG, not the ADA Standards, has been going through notice and comment rulemaking and it is the ADA Standards, not the ADAAG, that binds private builders of places of public accommodation like Cinemark.[5] Second,

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5. Congress delegated to the DOJ, not the Access Board, initial responsibility for rulemaking under Title III, and thus it is the DOJ's own ADA Standards that are legally enforceable on private facilities, not ADAAG. While Congress charged the Access Board with the responsibility to issue "minimum guidelines" for implementing Title III (42 U.S.C. § 12204(a)), and further provided that, if the DOJ failed to timely promulgate regulations to implement Title III, compliance with the Access Board's regulations would be sufficient to "satisfy the requirement[s]" of Title III (42 U.S.C. § 12186(d)), any contingent legal effect was mooted when the DOJ's own design standards were issued on July 26, 1991. *See, e.g.*, DOJ Opening Brief for Appellant at 25-26, *United States v. Cinemark*, Supp. App. 1a-2a ("Once [the DOJ issued] its own regulation, it became, as the statute contemplates, the Justice Department's and only the Justice Department's responsibility."); *accord* DOJ Brief for Amicus Curiae at 11, *Stewmon v. Regal*, Supp. App. 3a-4a ("[t]he Attorney General has the sole power to issue binding regulations to carry out [Title III's] "new construction" provisions"); Access Board, (Cont'd)

any new regulation, necessarily prospective, will do nothing to resolve the debilitating regulatory limbo surrounding the thousands of theater complexes built before the DOJ's *de facto* amendment of Standard 4.33.3.

C. This Case Is A Proper Vehicle For Review.

The Government's opposition to certiorari on the ground that the Sixth Circuit remanded the case to the district court is not well-grounded. This Court has frequently granted certiorari in analogous circumstances,[6] such as when an appellate court definitively answers questions that are fundamental to the further conduct of the case (*see Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947)), when the issues presented are important and otherwise worthy of certiorari and this Court's intervention may serve to hasten or resolve the litigation (Robert L. Stern, *et al.*, *Supreme Court Prac.* 260 (8th ed. 2002) (citing *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977)), or when the Court's intervention would resolve circuit conflicts and uniformity within the circuits is particularly imperative (*see, e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 192-

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(Cont'd)

Draft Final ADA and ABA Accessibility Guidelines § 101 (April 2002) (stating that "draft" guidelines "are to be applied . . . to the extent required by regulations issued by Federal agencies under the Americans with Disabilities Act of 1990").

6. The Government's assertion that this Court "rarely grants review of such interlocutory challenges" (U.S. Br. at 20-21) contradicts the position it advanced just last year, when it successfully petitioned for certiorari in *Norton v. Southern Utah Wilderness Alliance*, No. 03-101, *cert. granted*, 124 S. Ct. 462 (2003). There, the Government argued, "[t]his Court frequently grants certiorari to resolve important threshold questions when, as here, a federal court of appeals has reversed the grant of a motion for dismissal or summary judgment and remanded for further proceedings." *See* Reply Brief in Support of Petition for Certiorari at 2, available at <http://www.usdoj.gov/osg/briefs/2003/2pet/7pet/2003-0101.pet.rep.pdf> (citations omitted).

93 (1974); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 374 (1945); *see also* 28 U.S.C. § 1254(1)).

This case presents all of these factors. The Sixth Circuit's decision that Standard 4.33.3 requires consideration of "viewing angles" is both fundamental and final. *See United States v. Cinemark*, 348 F.3d at 578-79. On remand, the district court cannot stray from this interpretation, and is expressly charged with the task of assessing the extent to which "lines of sight" must be similar for wheelchair patrons in stadium-style theaters using "viewing angles" criteria. *Id.* Granting certiorari now would spare the parties from a potentially unnecessary exercise in litigating the propriety of specific retroactive remedies and is particularly appropriate given Regal's own pending and related Petition, which poses no interlocutory challenges. Moreover, the issues in this case are important and worthy of review. The ADA issues impact all public accommodations and the administrative law issues affect all regulated industries. Granting review now would not only serve to hasten the resolution of the issues in the present case, but would also likely hasten resolution of many other cases throughout the country, including, but not limited to similar ADA cases pending in the First, Second, and Ninth Circuits.

The DOJ's claim in this litigation – that Cinemark's movie theater design reflects a nationwide pattern and practice in violation of the ADA – further reinforces the need for this Court's intervention. Cinemark's designs were deemed to have met the DOJ-certified Texas Accessibility Standards. Cinemark Petition at 4-6. The Fifth Circuit held that the same designs complied with Standard 4.33.3 and expressly rejected the DOJ's interpretation. Now, however, the Sixth Circuit holds that the designs must be assessed for "viewing angles" criteria even in small venues where dispersal is not required under Standard 4.33.3 based on the DOJ's interpretation, previously rejected in the Fifth

Circuit.[7] There is no obvious reason why the Sixth Circuit's view ought to take precedence over the Fifth Circuit's judgment, particularly where, as here, the Fifth Circuit opinion preceded the Sixth Circuit opinion, is not distinguishable (as acknowledged by the Sixth Circuit), and the DOJ participated in both cases, presenting its "interpretation." Having had its position rejected in the Fifth Circuit, the DOJ's backup plan was to pursue Cinemark in the Sixth Circuit and thereby create a circuit conflict for Cinemark on both ends. Other movie theater operators face similar jeopardy as a result of the DOJ's litigation campaign and nonacquiescence. This Court's voice would settle the dispute and provide the clarity and certainty Congress intended under Title III and preserve the checks and balances Congress contemplated in enacting the APA.

III. CONCLUSION

The DOJ's deliberate strategy to bypass rulemaking in favor of retroactive enforcement of a new ADA design standard in litigation contradicts Congress's mandate to provide builders with clear and prospective notice of design requirements and upsets the settled expectations of an entire industry. The Government's strategy has created deep, irreconcilable, and intolerable circuit conflicts. The petition for a writ of certiorari should be granted.

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7. The DOJ has opposed Cinemark's motions that, in light of the *Lara* decision, at least the Fifth Circuit theaters be stricken from its nationwide action. *See, e.g.*, Brief in Opposition to Defendant's Motion for Partial Summary Judgment, *United States v. Cinemark*, Supp. App. at 5a-8a. And notwithstanding the DOJ's convenient last minute oral representations to a Sixth Circuit panel deeply troubled by the inherent comity issues (*United States v. Cinemark*, 348 F.3d at 584), the agency has neither withdrawn its pleading with regard to theaters in the Fifth Circuit, nor has it ceased to seek a nationwide order.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS APPELLANT FILED JUNE 5, 2002

No. 02-3100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CINEMARK USA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLANT

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Appendix A

* * *

Therefore, although the Access Board originally drafted the comparable "lines of sight" language that the Department of Justice adopted in Standard 4.33.3, it is the Department's views – not the Access Board's – to which the courts owe deference in determining the meaning of the Department's regulation. See *Paralyzed Veterans*, 117 F.3d at 585 (courts must defer to the Department of Justice, not the Access Board, in interpreting Standard 4.33.3). "Once the Board's language was put out by the Department as its own regulation, it became, as the statute contemplates, the Justice Department's and only the Justice Department's responsibility." *Ibid.*

* * * * *

APPENDIX B — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL FILED OCTOBER 19, 2001

No. 01-35554

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON PARALYZED VETERANS OF AMERICA,
an Oregon non-profit corporation,

Plaintiff,

and

KATHY STEWMON; TINA SMITH; KATHY BRADDY,

Plaintiffs-Appellants,

v.

REGAL CINEMAS, INC.,
a Tennessee corporation doing business in Oregon;
EASTGATE THEATRE, INC., d/b/a Act III Theater,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF OREGON

Appendix B

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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* * *

The Department of Justice has principal authority for administering the provisions of the ADA that govern the design and construction of new facilities. The Attorney General has the sole power to issue binding regulations to carry out those "new construction" provisions. See 42 U.S.C. 12186(b); see also 42 U.S.C. 12183(a)(1). And the Department of Justice is the only federal agency with authority to enforce Title III of the ADA, which includes the new construction requirements. See 42 U.S.C. 12188(b)(1)(B).

* * * *

APPENDIX C — EXCERPTS FROM PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT FILED APRIL 26, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. 1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

v.

CINEMARK USA, INC.,

Defendant

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT

* * *

Appendix C

ARGUMENT

A. PARTIAL SUMMARY JUDGMENT UNDER *LARA* IS NOT APPROPRIATE AT THIS STAGE OF A PATTERN OR PRACTICE CASE

In order to establish that a "pattern or practice" of discrimination in violation of Title III of the ADA exists, the United States must show that "the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature . . . a company repeatedly and regularly engaged in acts prohibited by the statute." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, n.16 (1977) (citing 110 Cong. Rec. 14270 (1964). Cinemark's many theaters located within the Fifth Circuit constitute part of this "pattern or practice." Discovery about those theaters is necessary to establish that such a pattern or practice of discrimination did in fact occur. The earlier summary judgment decision in this case effectively pre-empted discovery about Cinemark's liability nationwide for ADA Title III violations in failing to provide "comparable lines of sight" for wheelchair seating in Cinemark theaters, leaving the current fact record upon remand almost completely undeveloped. Moreover, nothing in the Sixth Circuit's decision, the briefs filed by the United States in this case, representations at oral argument by counsel for the United States, published opinion, or caselaw, supports Cinemark's specious claim that its stadium-style movie theaters within the Fifth Circuit should be excluded from any liability finding in this case, and, as such, these theaters are appropriately included in the United States' case-in-chief on liability and should be subject to adequate and reasonable discovery by the United States.

Appendix C

In the Sixth Circuit, the United States argued that Cinemark's assertion was premature that summary judgment for its theaters located within the Fifth Circuit was appropriate. *See* United States' Reply Brief in the Sixth Circuit at 18-19 (citing *Peveler v. United States*, 269 F.3d 693, 699 (6th Cir. 2001) (attached as Exhibit 1E). "[T]he law in the Fifth Circuit will become relevant at the ***remedial stage*** if the district court finds Cinemark liable on remand. If *Lara* is still the law of the Fifth Circuit at that time, the district court should not order relief regarding the theaters within that Circuit . . . **But, at the present time, one cannot be sure that *Lara* will still be the law of the Fifth Circuit on the 'lines of sight' issue by the time the district court is ready to enter judgment on remand**." *Id.* (Emphasis added; citations omitted.)

The Sixth Circuit denied Cinemark's request to affirm the this Court's grant of summary judgment for all of its theaters located within the Fifth Circuit and agreed with the United States that the *Lara* holding is only relevant at the remedial stage of this litigation, when considering the "scope of relief" for Cinemark's theaters within the Fifth Circuit. Cinemark asked the Sixth Circuit to affirm this court's grant of summary judgment for all of its stadium-style theaters within the Fifth Circuit. *Cinemark*, 348 F.3d at 584. The Sixth Circuit, making short shrift of Cinemark's argument, stated "[t]his pertains to the ***scope of relief***, and therefore is a matter for the district court to decide consistent with the principles of comity." *Id.* (emphasis added); US Opposition, Facts ¶9. This Court should likewise decline Cinemark's invitation to limit review of this case by granting partial summary judgment prematurely.

Appendix C

The Sixth Circuit's opinion and the mandate rule[3] now require that consideration of the effect of the Fifth Circuit's decision in *Lara v. Cinemark* on the instant action be reserved until after a liability ruling on the United States' pattern or practice claims. *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (trial court precluded from reconsidering issue expressly or impliedly decided by appellate court). Summary judgment is not only premature at this time, but would violate the mandate rule.

* * * *

3. Under the mandate rule, after an appellate court has remanded a case to a lower court, the lower court must follow the decision that the apellate court has made in the case, unless new evidence or an intervening change in the law dictates a different result. Black's Law Dictionary (7th ed. 1999).